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IN THE

Supreme Court of The United States

October Term, 1960

No. 352

PONCA WHOLESALE MERCANTILE COMPANY,
a corporation,

Appellant,

vs.

ROCKY MOUNTAIN WHOLESALE COMPANY, INC.,
a corporation,

Appellee.

On Appeal from the Supreme Court
of the State of New Mexico

MOTION TO DISMISS AND OR AFFIRM

BRIEF FOR APPELLEE IN SUPPORT OF MOTION TO DISMISS AND OR AFFIRM

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MOTION TO DISMISS AND OR AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves to dismiss and/or affirm on the grounds that no substantial federal question has been raised, or, in the alternative to dismiss on the grounds that the Jurisdictional Statement does not present a substantial federal question and that the federal questions contained therein as presented were not timely raised or expressly passed on by the Courts below; and to affirm on the grounds that the questions presented are so unsubstantial as to need no further argument.

STATEMENT

This is a direct appeal from the final judgment of the Supreme Court of the State of New Mexico which affirmed the judgment of the District Court of Bernalillo County, State of New Mexico. The New Mexico Cigarette Fair Trade Practices Act Laws of 1949, and ch. 175, Sections 1 to 13, incl., (49-3-1, 49-3-13, N. M. S. A., 1953).[1]

Appellant, in its Statement of the Case at pages 6 and 7 of Jurisdictional Statement has set down in its footnote number 2 a tabulation entitled "Net Cost In Purchases From Manufacturer" and another entitled "Cost To Wholesaler as defined by the act." At the end, there is a notation indicating a profit of 12 3/5 cents per carton. These tabulations do not appear in the transcript of the trial, excepting in appellant's brief in support of its motion for rehearing in the Supreme Court of the State of New Mexico (R. 313, 314). All such material was available and under the exclusive control of appellant.

Appellant deducted 2% cash discount from its net cost of purchases. A cash discount is not an element of the price, but is allowed for prompt payment only. Appellant in its "cost to wholesaler" used the formula of adding 2% as its cost of doing business and that formula is to be used only in the absence of proof of a lesser or higher cost of doing business by the wholesaler making the sale. Appellant had an opportunity at the time of the trial of this case on its merits (R. 74-76) to establish that it had a lesser cost of doing business than the 2% required to be added to the "basic cost to wholesaler" to cover such costs.

The very terms of the definition of "cost to wholesaler",

[1]Text of Act appears in appellant's Jurisdictional Statement as Appendix B p. 31.

set down in full in footnote number 1 of Jurisdictional Statement, page 5, gave appellant an opportunity to establish its lesser cost but it failed to do so. In fact, a subpoena duces tecum was served on appellant commanding it to produce all of its records covering its sales of cigarettes to Furr's Super Markets in Albuquerque, New Mexico, which included not only its sales records, but its cost accounting records and such other records as would indicate all overhead including salaries of executives and officers, tax, etc. as provided in that definition, which records were under the exclusive control of appellant. It refused to do so unless ordered by the Court (statement of counsel for appellant R-75). Instead, appellant stipulated that it was selling cigarettes to Furr's Super Markets in Albuquerque and to Safeway at six cents per carton under "cost to wholesaler."

Appellant, on page 10 of its Jurisdictional Statement under Federal Questions are Substantial, makes the statement that the definition of "wholesaler" in the New Mexico Cigarette Fair Trade Practices Act is not broad enough to include manufacturers of cigarettes selling to direct buying retailers and thus exempts such manufacturers from the provisions of the act.

The New Mexico Cigarette and Tobacco Tax Act defines the term "distributor" in Section 72-14-1(g) as follows:

> "The term 'distributor' means and includes any person, wherever resident or located, who brings or causes to be brought into this state, unstamped cigarettes purchased directly from manufacturers thereof and also any person who manufactures or produces or causes to be produced, cigarettes, and sells, uses or distributes the same within this state."

Manufacturers of cigarettes are clearly controlled by the

Act. It must be remembered, however, that none of the manufacturers of cigarettes are located within the boundaries of the State of New Mexico and they ship cigarettes in interstate commerce to distributors in the State of New Mexico. Distributors are wholesalers of cigarettes who purchase direct from the manufacturer and affix the cigarette tax stamp to the packages of cigarettes within the State of New Mexico. Both appellant and appellee belong in this class of wholesalers. There is another class of wholesalers operating in New Mexico, the definition of which is contained in section 72-14-1 (h) of the New Mexico Cigarette and Tobacco Tax Act and which reads as follows:

> "(h) The term 'wholesaler' means any person in this state, other than a distributor as defined herein, who acquires stamped cigarettes, at least seventy-five per centum (75%) of which are for the purpose of resale to retail dealers in this state or to other persons for the purpose of resale only."

ARGUMENT

The time has past when the power of a state government to enact laws for the public welfare of its citizens as a necessary element to the owning of private property can be questioned, and no longer is it an objection to its reasonable exercise and that the value of private property may be lowered or otherwise unfavorably affected.

The final judgment of the Supreme Court of the State of New Mexico is clearly correct. Section 49-3-3 of the New Mexico Cigarette Fair Trade Practices Act makes it unlawful for a wholesaler to advertise, offer to sell, or sell at wholesale, cigarettes at less than "cost to wholesaler" with intent to injure competitors or destroy or substantially lessen com-

petition. That section also imposes a penalty for the violation of the provisions of that section. (Jurisdictional Statement 33).

The right of a state to prohibit sales below cost is well settled and this question was passed on only two years ago by the United States Supreme Court in Safeway Stores, Inc., vs. Oklahoma Retail Grocers Association, Inc. and Louie J. Speed, Inc., 360 U. S. 334. This Court in its opinion made the following observation with reference to laws prohibiting sales below cost:

> "Trading stamps are given to cash customers 'across the board', namely, the number of stamps varies directly with the total cost of goods purchased. Safeway's price cutting, however, was selective. This difference is vital in the context of this act. One of the chief aims of the state laws prohibiting sales below cost was to put an end to 'loss-leader' selling. The selling of selected goods at a loss in order to lure customers into the store is termed not only a destructive means of competition, but it also plays on the gullability of customers by leading them to expect what generally was not true, namely that a store which offered such an amazing bargain was full of other such bargains. Clearly, there is reasonable basis for a conclusion that selective price cuts tend to perpetuate this abuse, whereas the use of trading stamps does not."

No facts are raised on this appeal which operate adequately to distinguish this case from the more comprehensive Safeway case previous before this Court.

It must be presumed that the legislature of the State of New Mexico made a thorough study of economic conditions

in New Mexico surrounding the sales of cigarettes in this State. Evidence of this fact is the Preamble to the New Mexico Cigarette Fair Trade Practices Act which appears in footnote number 5, page 12 of the Jurisdictional Statement. Having come to the conclusion that the act was necessary to promote the public welfare of the citizens of the State of New Mexico, by prohibiting the sales of cigarettes below cost in the retail and wholesale trade, it enacted the act which is the subject matter of the appeal in this case. The wisdom of the legislature of a state and the effectiveness of its action is not before this Court for review. Only the question of whether or not the action of the legislature is reasonable and nondiscriminatory. This Court in *Mayo, Commissioner of Agriculture of Florida, et al vs. Lakeland Highlands Canning Co.*, et al 309 U.S. 310 at 318 made the following statement:

> "The appellees' principal attack upon the statute, based upon the constitution, centers on its regulation of prices. The mere fact that the act fixes prices is, in itself, not sufficient to invalidate it, and allegation of that fact does not raise substantial federal questions. The presumption that an act fixing prices is constitutional would require the denial of a temporary injunction, except in extraordinary situations. Findings to support a conclusion against constitutionality would need to be unequivocal."

The cases cited by appellant in its footnote number 3 on page 9 of its Jurisdictional Statement and relied upon by appellant to support its claim that the right of an owner to establish the price at which his property is to be sold is protected by constitutional guarantee is refuted by the following cases: *Olsen vs. Nebraska* 313 U.S. 236 in which this Court, at pages 244 through 246 discussed these cases thoroughly and the change in the law on the question which is

the subject of appellant's statement referred to herein above; also in *Lincoln Federal Labor Union vs. Northwestern Iron and Metal Co.* 335 U.S. 525 at page 536, this Court expressly repudiated the decision in the case of *Charles Wolff Packing Co. vs. Court of Industrial Relations.*

The fact that the New Mexico Cigarette Fair Trade Practices Act classifies wholesalers and retailers including "direct buying retailers" separately, does not raise any substantial Federal question inasmuch as it has been long settled that the legislature of a state may validly make such different classifications. The Federal Court in the case of *Mennen Co. vs. Federal Trade Commission* (C.C.A. 2 1923), 228 Fed. 774, cert. denied 262 U. S. 759, although it did reverse the order of the Federal Trade Commission, said in discussing the particular question:

> "In conclusion it ought perhaps to be said that we have not been unmindful of the fact that the Mennen Company in classifying purchasers into two groups, those of wholesalers and retailers, placed in the groups of retailers a class of mutual or cooperative corporations which purchased in large quantities the Mennen products. These mutual or cooperative corporations, it is admitted, consist solely of the retailers in the same line of trade; the stock being held exclusively by retailers. The fact that these individuals, admitted by the counsel for the Federal Trade Commission to be retailers, see fit for their own convenience to organize themselves into a corporation which they constitute their agent for purchasing purposes, does not change their character, or the character of their purchases, and convert them into wholesalers.
>
> "Whether a buyer is a wholesaler or not does not de-

pend upon the quantity he buys. It is not the character of his buying, but the character of his selling, which marks him as a wholesaler, as this court pointed out in *Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co.*, supra (277 Fed. 46). A wholesaler does not sell to the ultimate consumer. Mutual or co-operative concerns are buying for themselves to sell to ultimate consumers, and not to other 'jobbers' or to other 'retailers.' The nature of the transaction herein involved is not altered by the fact that they make their purchases through the agency of their corporation. For some purposes a corporation is distinct from the members who compose it. But that distinction is a fiction of the law, and the courts disregard the fiction whenever the fiction is urged to an intent and purpose which is not within its reason and policy. And in such a case as this the fiction cannot be invoked. The important fact is that the members of the corporation are all retailers who buy for themselves to sell to the ultimate consumer. The Mennen Company is within its rights in classifying them as retailers."

The following cases, among many others follow the same trend; *National Biscuit Co. vs. Federal Trade Commission* 299 Fed. 733; *Kresge vs. Champion Spark Plug*, 3 Fed. 2d 415; *Federal Trade Commission vs. Ruberoid Co.*, 343 U.S. 470.

A statute is unreasonable, arbitrary and discriminatory in its classification only if there is no justifiable basis for the legislature in creating the classifications established by law. See *Patsone vs. Pennsylvania* 232 U.S. 138. The above principal is clearly set out in the case of *Metropolitan Casualty Insurance Co. vs. Brownell, Receiver*, 294 U.S. 580 at 583 to 586. This Court laid down the rule which is in effect

as follows: The Equal Protection Clause does not prohibit legislative classification and the imposition of statutory restraints on one class which are not imposed on another provided there is a reasonable basis for the imposition of such statutory restriction.

A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it.

It is not the function of an Appellate Court to weigh evidence or to question the wisdom or the appropriateness of the acts of a state legislature, but only if they are unreasonable and discriminatory.

The questions presented by appellant, pages 3 and 4 of its Jurisdictional Statement, were not timely raised or expressly passed on by the Courts below. An examination of the record will show that appellant did not request either a finding of fact or a conclusion of law that raised either of the questions covered under Questions Presented, in its Jurisdictional Statement (R. 30-34).

It is true that Mr. Cooper of Counsel for appellant in the District Court mentioned competition with the manufacturer. However, a review of the record, pages 107 to 109, will show that Mr. Cooper was only trying to explain his line of questioning. In appellant's motion for rehearing (R. 307) it did not base its motion for rehearing upon violation of the Fourteenth Amendment to the Constitution of the United States. Furthermore, appellant's motion for rehearing was made pursuant to rule 18 of the Supreme Court Rules of the State of New Mexico. This rule was interpreted in the case of *Pitek vs. McGuire*, 51 New Mexico 364; 184 P. 2d 647, where the Court in its opinion stated:

> "On rehearing, only those questions are reviewable which are provided for by the rule and matters which might have been considered on the original appeal but were not raised, will not be considered."

On the subject of whether or not the Supreme Court of the State of New Mexico expressly passed on the questions raised, the attention of the Court is called to the order of the Court denying appellant's motion for rehearing. It will be noted that the Court denied the motion without passing on the merits of the motion for rehearing or on the subjects covered by appellant's brief in support of its motion for rehearing, which would include at that time, the questions raised in appellant's Jurisdictional Statement under the heading Questions Presented, Jurisdictional Statement pp. 3 and 4. It is obvious from the fact that the Court did not pass on the merits that it considered that the questions raised by appellant's motion for rehearing and the points and questions argued in its brief in support of such motion were not timely raised.

CONCLUSION

It is respectfully submitted that this Court should dismiss the appeal and affirm the judgment of the Court below on the grounds urged in appellee's motion to dismiss and/or affirm.

Respectfully submitted,

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PROOF OF SERVICE

I, Louis C. Lujan, attorney for Rocky Mountain Wholesale Company, Inc., a corporation, appellee herein and a member of the Bar of the Supreme Court of the United States hereby certify that on the 18th day of September, 1961, I served a copy of the foregoing Motion to Dismiss and/or Affirm and Brief for appellee in support of Motion to Dismiss and/or Affirm, on Ponca Wholesale Mercantile Company, appellant herein, by delivering the same to James T. Paulantis, in person, in his office, 1220 Simms Building, Albuquerque, New Mexico, who is attorney and counsel of record for said Ponca Wholesale Mercantile Co.

Louis C. Lujan